In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-98

RUDOLPH O. SCHNEIDER, JR. AND
STEVEN VITALE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted of having conducted an illegal gambling business in violation of 18 U.S.C. 1955 and of conspiracy to commit the substantive offense. Petitioner Schneider was sentenced to concurrent terms of imprisonment for one year on each count. Petitioner Vitale was sentenced to concurrent terms of six months imprisonment on each count. The court of appeals affirmed (Pet. App. A.).

Petitioners contend, as they did below, that 18 U.S.C. 1955 is unconstitutional because Congress, in the exercise of its power under the Commerce Clause, cannot outlaw intrastate activities in the absence of proof in an individual case that such activity affects interstate commerce. The same issue has been raised in a petition for a writ of certiorari in *Harris* v. *United States,* No. 72-87, this Term. In that case, the Fifth Circuit, as did the Eighth Circuit in the instant case, concluded, after a lengthy review of the legislative findings underlying the statute, that the statute's application to intrastate gambling activities is valid under the Commerce Clause because of the effect of this class of activities on interstate commerce. The Second, Third and Sixth Circuits have, for similar reasons, rejected attacks on the validity of the statute like the one the present petitioners are making. See *United States* v. *Becker,* C.A. 2, No. 72-1105, decided May 30, 1972; *United States* v. *Riehl,* C.A. 3, Nos. 71-2133-5, decided May 9, 1972, *United States* v. *Palmer,* C.A. 6, Nos. 71-1596-7 decided March 31, 1972, petition for a writ of certiorari pending, No. 72-2.

This Court rejected this same kind of argument advanced in the petition when it was made against the federal loansharking laws. *Perez* v. *United States,* 402 U.S. 146. There is no reason for this Court to reconsider essentially the same constitutional question in the context of the federal gambling statutes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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